

**OPEN RECORDS AND MEETINGS OPINION
2009-O-08**

DATE ISSUED: June 15, 2009

ISSUED TO: University of North Dakota Alumni Association and
University of North Dakota Foundation

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Terry Narum asking whether the University of North Dakota Alumni Association and University of North Dakota Foundation violated N.D.C.C. § 44-04-18.

FACTS PRESENTED

On December 30, 2008, Terry Narum requested a copy of the contract between the University of North Dakota (UND) Alumni Association and one of its vendors. Prior to this request, he had also asked why the University of North Dakota (UND) Foundation and Alumni Association had his social security number. Both organizations jointly responded to Mr. Narum stating:

North Dakota law allowed UND to provide SSNs to the UND Foundation, which manages UND's donor lists. The specific [law] that allows this is Section 44-04-28 of the North Dakota Century Code entitled: Social security numbers – Confidential. It says that social security numbers may be released to an agent of the entity authorized to have the SS numbers. In this case, UND can provide SSNs to the UND Foundation, because the Foundation is performing its duty and responsibility in maintaining the database on behalf of UND, per a Memorandum of Understanding that requires the Foundation to perform these database and fundraising functions. The University of North Dakota Foundation and the UND Alumni Association are private non-profit corporations, separate and independent from the University of North Dakota. As such they are not Public Entities under the North Dakota Open Records Laws.¹

¹ E-mail from UND Alumni Association and UND Foundation to Terry Narum (Nov. 10, 2008, 10:39 AM).

The Alumni Association is a nonprofit organization that was organized on June 7, 1915. The UND Foundation is a separate nonprofit organization organized on May 22, 1978, to maintain funds for the benefit of UND, provide scholarships, student loans, faculty awards, and cooperate with and aid the Alumni Association.

Although both the UND Foundation and Alumni Association are separate nonprofit organizations, they have a common board of directors and share staff and administrative offices on the UND campus. The organizations jointly responded to questions from this office.

The UND Foundation and Alumni Association have an agreement with the University of North Dakota entitled "Master Agreement between the University of North Dakota and its Associated Foundations" ("master agreement") as required by the State Board of Higher Education (SBHE).² Under the master agreement, the UND Foundation is responsible for raising, receiving, investing, and administering funds for UND and its other foundations.³ The Alumni Association is responsible for maintaining a database that includes "accurate mailing addresses, telephone numbers, and other pertinent information for all graduates and former students, friends, foundations, and corporations who have donated to the UND Foundation."⁴

In order to maintain the alumni database, the UND Foundation entered into a contract with a vendor. The vendor received alumni information, including social security numbers, from the UND Foundation and Alumni Association to maintain in the database. Mr. Narum asked for a copy of the contract. The UND Foundation and Alumni Association refused to provide a copy of the contract, telling Mr. Narum that they were not public entities under the North Dakota open records law.

ISSUE

Whether the UND Foundation and Alumni Association violated the open records law by failing to provide a copy of a software vendor contract.

² See State Board of Higher Education Policy § 340.2, Foundations (defining a foundation as "an independent, non-profit organization that exists solely to support and advance the mission and objectives of an institution or institutional functions").

³ Master Agreement between the University of North Dakota and its Associated Foundations, §§ 7.1 and 7.1.1.

⁴ Master Agreement between the University of North Dakota and its Associated Foundations, § 7.1.2.

ANALYSIS

Except as otherwise specifically provided by law, all records of a public entity are public records.⁵ “Record” means recorded information of any kind, regardless of the physical form or characteristic by which the information is stored, recorded, or reproduced, which is in the possession or custody of a public entity or its agent and which has been received or prepared for use in connection with public business or contains information relating to public business.⁶

The North Dakota Supreme Court has held that the open records law cannot be circumvented by delegating a public duty to a third party.⁷ Where a government entity has delegated a public duty to a third party, documents in possession of the third party connected with public business are public records within the meaning of N.D.C.C. § 44-04-18.⁸

In 2006, I determined that the North Dakota State University (NDSU) Research Foundation acted as an agent of NDSU when it managed the intellectual properties of the University.⁹ In that opinion, the NDSU Research Foundation did work for NDSU pursuant to a contract called a “cooperation agreement.”¹⁰ The delegation of public business to the NDSU Research Foundation made it an agent of NDSU and subject to the open records law.¹¹ As a result, the NDSU Research Foundation provided the Dakota Resource Council with copies of the contract it had with Monsanto.¹²

Here, as with the NDSU Research Foundation, the UND Foundation and the Alumni Association have a contract with UND to maintain the alumni database entitled the “master agreement.” It is because of this agency relationship that UND is permitted to provide the UND Foundation and Alumni Association with the social security numbers of its students and graduates. Social security numbers are confidential under N.D.C.C. § 44-04-28 and may only be released by a public entity to “another public entity or its agent, employees, or contractors if disclosure is necessary for the receiving entity to perform its duties and responsibilities.”¹³

⁵ N.D.C.C. § 44-04-18(1).

⁶ N.D.C.C. § 44-04-17.1(15).

⁷ Forum Publ'g Co. v. City of Fargo, 391 N.W.2d 169, 172 (N.D. 1986).

⁸ N.D.A.G. 2006-O-01; N.D.A.G. 99-O-02 (citing Letter from Attorney General Nicholas Spaeth to Ken Solberg (August 2, 1991)).

⁹ N.D.A.G. 2006-O-01.

¹⁰ Id.

¹¹ Id. See also N.D.A.G. 99-O-02.

¹² N.D.A.G. 2006-O-01.

¹³ N.D.C.C. § 44-04-28(2)(c).

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Based on the foregoing, it is my opinion that when the two organizations perform the governmental functions set forth in the master agreement, they are acting as agents of UND. It is further my opinion that the UND Foundation and Alumni Association are subject to the open records law with regard to records that may be received or prepared for use in connection with public business or contain information relating to public business.

The contract requested by Mr. Narum was one with a vendor used to maintain the alumni database. Such a contract is "recorded information received or prepared for use in connection with public business" and is therefore subject to the open records law.¹⁴ Generally, contracts to which a public entity is a party are open records.¹⁵ Similarly, public records in the possession of an agent of a public entity must be disclosed unless they are exempt or confidential.¹⁶

The contract has been reviewed by members of my office who have concluded it does not include any donor information. Donor records in the possession of the university system and affiliated nonprofit organizations are exempt.¹⁷ However, the records protected under N.D.C.C. § 44-04-18.15 are specific to a donor's name, address, telephone numbers, e-mail address, estate planning information, tax record or financial information, none of which is contained in the contract requested by Mr. Narum.¹⁸

Thus, it is my opinion that the UND Foundation and Alumni Association violated N.D.C.C. § 44-04-18 by refusing to provide a copy of the contract to Mr. Narum.

CONCLUSION

The Alumni Association and UND Foundation violated N.D.C.C. § 44-04-18 by failing to provide a copy of a software vendor contract.

¹⁴ N.D.C.C. § 44-04-17.1(15) (definition of record).

¹⁵ See N.D.A.G. 98-L-17.

¹⁶ See N.D.A.G. 2008-O-15; N.D.A.G. 2008-O-07; N.D.A.G. 2001-O-04; N.D.A.G. 2001-O-02.

¹⁷ N.D.C.C. § 44-04-18.15.

¹⁸ Id.

STEPS NEEDED TO REMEDY VIOLATION

A complete copy of the contract, including all attachments and exhibits, between the Alumni Association and UND Foundation and the software vendor must be provided to Mr. Narum free of charge.

Failure to take the corrective measures described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2.¹⁹ It may also result in personal liability for the person or persons responsible for the noncompliance.²⁰

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¹⁹ N.D.C.C. § 44-04-21.1(2).

²⁰ Id.